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April 14, 2009

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Notice of Ex Parte Presentation*: WC Docket Nos. 08-24, 08-49

Dear Ms. Dortch:

Yesterday, Ed Cadieux, of NuVox, Lisa Youngers, of XO Communications, LLC, Charlie Hunter, of Broadview Networks, Inc., Mary Albert, of COMPTEL, Russ Blau and Phil Macres, of Bingham McCutchen, and Brad Mutschelknaus and the undersigned, of Kelley Drye & Warren LLP, met with Marcus Maher, Tim Stelzig, Don Stockdale, Randy Clarke, and Stephanie Weiner of the Wireline Competition Bureau. Our discussion focused on the joint proposed UNE forbearance standard submitted March 26, 2009 in the above captioned dockets.

More specifically, our discussion centered on the anti-competitive consequences of duopolies and the need to ensure the existence of more than a single wireline facilities-based competitor to the ILEC in a particular product market before forbearance from UNE obligations is granted. We also discussed the lack of substitutability between mobile wireless and wireline services. Finally, we urged the Commission to conduct separate competitive analyses for the residential and business product markets. The attached materials were distributed at the meeting.

Please contact me at (202) 342-8531 if you have any questions regarding this letter.

Respectfully submitted,

Genevieve Morelli

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Attachment

DUOPOLY THREATENS U.S. BROADBAND DEPLOYMENT AND IS INCONSISTENT WITH THE GOALS OF THE TELECOM ACT

Duopoly Impedes Broadband Deployment

The current dominance of many U.S. markets by (at most) two significant facilities-based providers – typically a telephone company and a cable company – serves to impede rather than stimulate broadband growth in the United States. As Acting Chairman Copps has explained,

> *How have we fallen so far behind? Through lack of competition. As the Congressional Research Service puts it, U.S. consumers face a "cable and telephone broadband duopoly."*
>
> *And that's more like a best case scenario: Many households are hostage to a single broadband provider, and nearly one-tenth have no broadband provider at all.*[1]

Acting Chairman Copps has expressed these concerns in previous UNE forbearance dockets:

> *[A]s the Commission looks to establish policies that promote broadband the lack of competitive alternatives in this market are a severe drag on these efforts ... More competition would certainly put downward pressure on broadband prices and yet the current cable-telephone form of competition has been insufficient to reach those with the least disposable income ... Accordingly, I have always been extremely leery of the test established in Qwest-Omaha and its progeny that rely so heavily on cable-telephone competition to determine whether there is sufficient competition in the marketplace. I would have been more comfortable with an analysis less accepting of duopoly as a competitive marketplace and that did not lead us further down this road.*[2]

These concerns have been echoed by Commissioner Adelstein:

> *Only rational competition policies can ensure that the US broadband market does not default into a stagnant duopoly . . . which is a serious*

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1 Copps, Michael J., *America's Internet Disconnect,* http ://www.washingtonpost.com/wp-dyn/content/article/2006 /11/07/AR2006110701230.html (Nov. 8, 2006). Commissioner Copps has issued a similar market analysis in numerous Commission proceedings and in testimony before the Senate Committee on Small Business and Entrepreneurship.

2 *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97, Memorandum Opinion and Order, *Concurring Statement of Commissioner Michael J. Copps,* 23 FCC Rcd 11884 (2008).

concern given that cable and DSL providers now control approximately 96 percent of the residential broadband market.[3]

Duopoly Impedes Competition

In addition, as the Commission has recognized, the effects of a telecom duopoly are innately inconsistent with the requirements of the 1996 Act. In the *UNE Remand Order*, the Commission concluded that an ILEC/cable duopoly does not constitute sufficient competition to realize the local market-opening goals of the Act. The Commission noted:

> *We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be "impaired" within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers.*[4]

The Commission went on to state that a standard that would be satisfied by the existence of a single competitor "would not create competition among multiple providers of local service that would drive down prices to competitive levels" and that "such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market."[5]

Similarly, in reviewing proposed mergers among competing satellite television providers, the Commission recognized that a merger resulting in duopoly "create[s] a strong presumption of significant anticompetitive effects."[6]

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3 Commissioner Jonathan S. Adelstein quoted in Anderson, Nate, *FCC Commissioners: US in dire need of "national broadband strategy"* http://arstechnica.com/tech-policy/news/2007/09/fcc-commissioners-us-in-dire-need-of-national-broadband-strategy.ars (Sept. 27, 2007).

4 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3726 (1999) ("*UNE Remand Order*").

5 *Id.*

6 *In the Matter of Application of EchoStar Communications Corporation*, Hearing Designation Order, 17 FCC Rcd 20559, 20605 (2002).

There is No Basis for the Commission to Include Mobile Wireless Services in the Same Product Market as Wireline Services

Excerpts from **VOICE, VIDEO AND BROADBAND: THE CHANGING COMPETITIVE LANDSCAPE AND ITS IMPACT ON CONSUMERS, U.S. Department of Justice (Nov. 2008), pp. 65-67.**

> *The existence of some consumers who choose to substitute wireless service for access to the landline network does not demonstrate that wireless service is an effective constraint on prices for access to landline services. That determination turns in part on the number of customers who choose to substitute to wireless services entirely in response to a specified price increase for landline telephone service, compared with the number of customers who would choose to stay with landline and pay the additional price ...*
>
> *Data indicate that more than 80 percent of residential customers do not consider mobile wireless to be a substitute for a landline telephone at current access prices, since they continue to pay for and use both. In addition, there is little evidence that landline telephone companies consider the threat of wireless substitution sufficient to change their access prices ... In fact, stand-alone access prices have remained relatively stable and do not appear to have declined substantially below the levels at which they are capped by regulation.*
>
> *Dr. Wilkie observed that econometric analyses of the issue have not shown that wireless and landline telephone services are in the same product market, though they may be getting close. (citing to Wilkie, Tr. at 128-29, "[W]hen economists do careful econometric studies of the degree of substitution and when we look at the access line, is there any evidence that the wireless substitution is sufficient such that it is in the same relevant product market, formally in the DOJ sense. They all say no."). He concluded that "even though we have the vast migration of minutes, we don't see any ability to constrain access pricing."*

Excerpts from **FIXED NARROWBAND RETAIL SERVICES MARKETS: CONSULTATION ON THE IDENTIFICATION OF MARKETS AND DETERMINATION OF MARKET POWER, Ofcom (19 Mar. 2009).**

Fixed line and mobile access are in separate markets for residential users.

> 4.34 *Our evidence suggests that while there is some substitutability between fixed and mobile access, consumers predominantly view the two types of access as meeting different needs and have a strong preference to purchase both fixed and mobile access. We, therefore, believe that fixed*

and mobile access are more appropriately considered to be in separate markets.

4.72 ... *If mobile and fixed calls were in the same market we would expect that when the price of mobile calls falls this would either lead to fixed call providers reacting by cutting their call prices or, if they chose to hold prices, that their volumes would fall. However, while we have seen a 22% decline in the average revenue per minute charged by mobile phone operators between 2002 and 2007, fixed prices have remained relatively unchanged over the same period. Fixed call volumes have also held up relatively well despite the lower absolute and relative costs of mobile calls, falling by only 10%.*

4.78 *Overall, while there is clear evidence of increasing fixed-mobile substitution, on balance we do not believe that such substitution is sufficiently strong to prevent a hypothetical monopoly supplier of fixed calls raising prices by 5-10%. We therefore take the view that fixed calls are likely to remain a relevant economic market.*

Fixed line and mobile access are in separate markets for businesses.

4.87 *Business's preference to retain their landline appears to be primarily driven by non-price factors with only 24% of respondents indicating that they would be prepared to substitute mobile for fixed access should the current price differential be eliminated.*

4.89 *As businesses appear to be very reluctant to switch from fixed to mobile access even in response to very large changes in relative prices we believe that business fixed line access is likely to be a relevant economic market.*

4.100 ... *[W]e therefore believe that the balance of evidence supports the view that business calls is a separate economic market ...*